

STATE OF MICHIGAN
COURT OF APPEALS

DEPARTMENT OF ENVIRONMENTAL
QUALITY and DIRECTOR OF THE
DEPARTMENT OF ENVIRONMENTAL
QUALITY,

Plaintiffs-Appellees,

v

TOWNSHIP OF WORTH,

Defendant-Appellee.

FOR PUBLICATION
August 17, 2010
9:00 a.m.

No. 289724
Ingham Circuit Court
LC No. 07-000970-CE

Advance Sheets Version

Before: OWENS, P.J., and SAWYER and O'CONNELL, JJ.

SAWYER, J.

In this case, we are asked to determine whether Michigan's Natural Resources and Environmental Protection Act (NREPA)¹ empowers the Department of Environmental Quality to require a township to install a sanitary-sewerage system when there is a widespread failure of private septic systems resulting in contamination of lake waters. We hold that it does not.

Defendant is a common-law township in Sanilac County along the shores of Lake Huron. It does not operate a public sanitary-sewerage system. All the residences and businesses within the township rely on private septic systems for waste disposal. A problem has developed with a number of those private septic systems located on a strip of land approximately five miles long that is between highway M-25 and Lake Huron. Some of these septic systems are failing, resulting in effluent being discharged into Lake Huron and its tributaries. For the past several years, plaintiff DEQ, as well as the county health department, have been pushing for defendant to install a public sanitary-sewerage system. Defendant has declined to do so, concluding that such a project would not be financially feasible.

Defendant's refusal to pursue a sanitary-sewerage project has resulted in the instant litigation to force it to do so. The parties pursued cross-motions for summary disposition,

¹ MCL 324.101 *et seq.*

resulting in an order of the circuit court granting summary disposition to plaintiffs, establishing a time frame for defendant to design, begin construction on, and begin operating a sewerage system intended to remedy the failing septic systems and resulting discharges.² The order also imposed a \$60,000 fine and awarded attorney fees. Defendant appeals this order and we reverse.

The resolution of this case rests on the proper interpretation and application of MCL 324.3109(2) and MCL 324.3115. Like a motion for summary disposition, we review a question of statutory interpretation *de novo*. *Bush v Shabahang*, 484 Mich 156, 164; 772 NW2d 272 (2009). Plaintiffs depend on the first statute to establish defendant's responsibility for the discharge from the private septic systems into the waters of Lake Huron and then rely on MCL 324.3115 for the remedy of requiring defendant to install and operate a public sanitary-sewerage system. We are not persuaded that MCL 324.3109(2) imposes the responsibility on defendant that plaintiffs suggest it does.

MCL 324.3109 provides in pertinent part as follows:

(2) The discharge of any raw sewage of human origin, directly or indirectly, into any of the waters of the state shall be considered *prima facie* evidence of a violation of this part by the municipality in which the discharge originated unless the discharge is permitted by an order or rule of the department. If the discharge is not the subject of a valid permit issued by the department, a municipality responsible for the discharge may be subject to the remedies provided in section 3115. If the discharge is the subject of a valid permit issued by the department pursuant to section 3112, and is in violation of that permit, a municipality responsible for the discharge is subject to the penalties prescribed in section 3115.

(3) Notwithstanding subsection (2), a municipality is not responsible or subject to the remedies provided in section 3115 for an unauthorized discharge from a sewerage system as defined in section 4101 that is permitted under this part and owned by a party other than the municipality, unless the municipality has accepted responsibility in writing for the sewerage system and, with respect to the civil fine and penalty under section 3115, the municipality has been notified in writing by the department of its responsibility for the sewerage system.

² Technically speaking, the circuit court's order does not specifically compel the construction of a sanitary-sewerage system. Rather, it refers to defendant's obligation "to take necessary corrective action" and then establishes a time frame for that action. The time frame refers to a deadline for defendant to submit for the DEQ's approval a "proposed service area," as well as deadlines for the design, approval by the DEQ, construction, and the beginning of operations of "the project." But, in light of plaintiffs' explicit statement that they view as the only practical option the construction of a municipal-sewerage system, it seems rather apparent that "the project" is a sanitary-sewerage system constructed and operated by defendant. In any event, as discussed later in this opinion, we conclude that no statutory authority grants plaintiffs the power to determine the appropriate remedy.

Defendant argues that MCL 324.3109 does not impose responsibility on a municipality for any discharge that occurs within its jurisdiction, but merely creates a rebuttable presumption that the municipality was the source of the discharge. We agree.

First, we must look to the meaning of “prima facie evidence.” Because this is a legal term not defined by the statute, we may consult a legal dictionary.³ Black’s Law Dictionary (5th ed), defines “prima facie evidence” as follows:

Evidence good and sufficient on its face; such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party’s claim or defense, and which if not rebutted or contradicted, will remain sufficient. Prima facie evidence is evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence.

Prima facie evidence is evidence that, until its effect is overcome by other evidence, will suffice as proof of fact in issue; “prima facie case” is one that will entitle party to recover if no evidence to contrary is offered by opposite party. Evidence which suffices for the proof of a particular fact until contradicted and overcome by other evidence. Evidence which, standing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced. An inference or presumption of law, affirmative or negative of a fact, in the absence of proof, or until proof can be obtained or produced to overcome the inference. [Citations omitted.]

This definition makes it abundantly clear that prima facie evidence is rebuttable. Thus, MCL 324.3109(2) clearly does not make a municipality automatically and conclusively responsible for a discharge of raw sewage. Rather, it merely creates the presumption that the municipality is responsible until and unless the municipality is able to establish that it did not violate part 31 of NREPA, MCL 324.3101 *et seq.*, which deals with the protection of water resources. Defendant advances a particularly compelling argument that it is not the source of the violation: it does not operate a sanitary-sewerage system that could be the source of the discharge.

Second, we look to the meaning of the phrase “by the municipality.” This phrase is key because it answers plaintiffs’ contention that MCL 324.3109(2) imposes responsibility for a discharge on a municipality without regard to the source of the discharge. That is, plaintiffs argue that any discharge of raw sewage within a municipality constitutes prima facie evidence of a violation by the municipality even if the municipality is not the source of the discharge. We disagree. The word “by” has many meanings. For its meaning as a nonlegal term, we look to a layman’s dictionary rather than a legal one. *Horace v City of Pontiac*, 456 Mich 744, 756; 575 NW2d 762 (1998). We find these definitions from the *Random House Webster’s College Dictionary* (1997) to be particularly helpful: “10. through the agency of” and “12. as a result or

³ *Nuculovic v Hill*, 287 Mich App 58, 67; 783 NW2d 124 (2010).

on the basis of[.]” Thus, MCL 324.3109(2) imposes responsibility on the municipality not when the violation merely occurs within the boundaries of the municipality, but when the violation occurs “through the agency of” the municipality or “as a result” of the municipality, that is to say, when it is the actions of the municipality that lead to the discharge.

The argument that the municipality must actually cause the discharge is further buttressed by a third factor. MCL 324.3109(3) explicitly states that a municipality is not responsible for a discharge from a sewerage system that is not operated by the municipality unless the municipality has accepted responsibility in writing for the sewerage system. If the purpose of subsection (2) were to impose liability on a municipality merely because a discharge occurred within its boundaries, then subsection (3) would be contradictory.

Indeed, an argument advanced by plaintiffs in an issue that we need not reach, whether the state is obligated to fund the sewerage system under the Headlee Amendment⁴ if defendant is compelled to construct one, further reinforces this argument. Plaintiffs argue that the obligation of a township to install a sanitary-sewerage system predates the Headlee Amendment and, therefore, does not constitute a new local obligation that the Headlee Amendment compels the state to fund. In making this argument, plaintiffs look to the former statute, MCL 323.6, which stated in pertinent part that any

city, village or township which permits, allows or suffers the discharge of such raw sewage of human origin into any of the waters of the state by any of its inhabitants or persons occupying lands from which said raw sewage originates, shall be subject only to the remedies provided for in [MCL 323.7].

Assuming for the sake of argument that such a remedy included the compulsory installation of a sanitary-sewerage system,⁵ while it would perhaps save the state from being obligated to fund a sewerage system in Worth Township if the current statute were to continue to impose such an obligation, it only serves to underscore that no such obligation exists. While part 31 of NREPA parallels the former act in many respects, there are some very noticeable differences. First, while former MCL 323.6(b) specifically referred to a “city, village or township,” current MCL 324.3109 refers more generally to “municipality,” a word that, as will be discussed later in this opinion, carries a much broader definition. But even more importantly, while former MCL 323.6(b) specifically addressed the issue of a city, village, or township that allowed a discharge to occur by any of its inhabitants, there is no such language in the current

⁴ See Const 1963, art 9, §§ 25 and 29.

⁵ Given the lack of any clear mandate in former MCL 323.7 of such a remedy, this would seem to be a great assumption indeed, particularly in light of the failure of past panels of this Court to find any such obligation. See, e.g., *McSwain v Redford Twp*, 173 Mich App 492, 499-500; 434 NW2d 171 (1988) (stating that “we do not believe defendant was required by statute to install a sanitary sewer system under the instant circumstances”); *Ahearn v Bloomfield Charter Twp*, 235 Mich App 486, 494-495; 597 NW2d 858 (1999) (concluding that just because a township has provided sanitary sewer service does not mean that it is under a continuing duty to do so).

statute that links responsibility for the actions of an inhabitant to a particular governmental body. It is a basic rule of statutory construction that a change in the use of words by the Legislature is intentional and reflects a similar change in meaning.⁶ So if, as plaintiffs argue, the old statute did impose an obligation on a township to install a sanitary-sewerage system in response to an inhabitant discharging sewage, then it follows that the change in wording of the statute reflects an intent by the Legislature to remove such an obligation.⁷

For these reasons, we agree with defendant's interpretation of subsection (2). When an unauthorized discharge occurs, the presumption arises that the municipality within whose boundaries the event occurs is responsible for the violation unless the municipality can establish that the discharge did not occur as the result of actions by the municipality. When, as here, the municipality could not have been the source of the discharge because it did not operate a sanitary-sewerage system, it has overcome that presumption and is not subject to the statutory remedies for a discharge.

In any event, even if we were to agree with plaintiffs that MCL 324.3109(2) creates a responsibility by a municipality for an unauthorized discharge of raw sewage and the municipality is thus subject to the remedies of § 3115, plaintiffs face another hurdle: the definition of "municipality." For purposes of part 31 of NREPA, MCL 324.3101(m) supplies a particular definition of "municipality": "this state, a county, city, village, or township, or an agency or instrumentality of any of these entities." Thus, the state is as much a municipality as is defendant. And, by extension, the state bears as much responsibility for the unauthorized discharges at issue in this case as does defendant. And the state is as liable to the remedies of § 3115 as is defendant. Thus, even if we were to agree with plaintiffs that MCL 324.3109(2) imposes on a "municipality" the responsibility of installing a sanitary-sewerage system to abate a problem with the discharge of raw sewage, plaintiffs offer no compelling reason why they should be permitted to shift their own responsibility to install a sanitary sewer onto defendant. Or, to put it another way, if plaintiffs are entitled to prevail in this action, then we see no reason why defendant could not counterclaim against plaintiffs and prevail in a claim seeking to require plaintiffs install the sewerage system.

Indeed, if the purpose of § 3109(2) is to impose responsibility on a governmental unit, it would seem that the legislative intent would be to make the DEQ the primary responsible agency because the Legislature had available to it the use of a term that did not include the state, namely "local unit." MCL 324.3101(l), defines "local unit" to mean "a county, city, village, or township or an agency or instrumentality of any of these entities." The only difference between the

⁶ *Bush*, 484 Mich at 167.

⁷ Indeed, plaintiffs' argument in this respect places them in a logical corner. If the prior statute did impose a duty on a township to install a sanitary-sewerage system in these circumstances, then the change in statutory language of necessity did away with that duty. But if no such duty existed under the previous statute and the current statute does impose one, then the Headlee Amendment obligates the state, of which the DEQ is an agency, to provide the funding in order for plaintiffs to compel defendant to install such a system.

definition of “local unit” and “municipality” in § 3101 is the inclusion of the phrase “this state” in the definition of “municipality” and not in the definition of “local unit.” The Legislature’s choice of “municipality” rather than “local unit” in § 3109(2) must have been intentional,⁸ and it must have been for the purpose of imposing liability on the state as well as a local unit.

But the more logical explanation is that § 3109(2) simply is not designed to establish responsibility for a discharge without causation. If the Legislature intended to, as plaintiffs suggest, impose responsibility on a governmental unit when an inhabitant causes a discharge, why would it use a term that would simultaneously impose such responsibility on three or four units of government⁹ without any clear mandate about which of those units had primary responsibility? But if we interpret the statute as suggested by defendant, then the statute creates the presumption that each of those units of government is the cause of the discharge and each avoids responsibility when it establishes that it was not the source of the discharge.

In sum, we hold that MCL 324.3109(2) does not impose blanket responsibility on a municipality for any sewage discharge that occurs within its jurisdiction and a corresponding obligation to remedy such discharges without regard to cause. Rather, it merely creates the presumption that such a discharge originated with the municipality. But when, as here, the municipality, defendant in this case, cannot have been the cause of the discharge, it holds no responsibility for the discharge. And, therefore, there is no basis to impose on defendant the obligation to pursue the remedy desired by plaintiffs, the installation of a public sanitary-sewerage system. The trial court should have granted summary disposition to defendant, not to plaintiffs.

In light of our resolution of this issue, we need not address the remaining issues raised by defendant.

The order of the circuit court granting summary disposition to plaintiffs is reversed. The matter is remanded to the circuit court with instructions to enter an order of summary disposition in favor of defendant. We do not retain jurisdiction. Defendant may tax costs.

/s/ David H. Sawyer

/s/ Donald S. Owens

⁸ See *Bush*, 484 Mich at 167.

⁹ Under the term “municipality,” the state and the county would always be responsible, as well as the city, village, or township.